STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS DAWSON,

Plaintiff-Appellee,

v

LEROY DELISLE, RON ALLMAN, PTI PAINT SATELLITE, L.L.C., PTI MANAGEMENT GROUP, INC., PTI QUALITY CONTAINMENT SOLUTIONS, INC., PTI MANAGEMENT STAFFING, INC., and PTI LOGISTICS NA, L.L.C.,

Defendants-Appellants,

and

FRANCIS LEO and WOCO U.S.A., INC.,

Defendants.

UNPUBLISHED
July 21, 2009

No. 283195
Wayne Circuit Court
LC No. 07-731127-CK

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant-appellants appeal by leave granted from the trial court's order denying their motion for summary disposition. We reverse the trial court's denial of summary disposition as to plaintiff's fraud and breach of fiduciary contract claims, but we decline to consider the remaining claims alleged in plaintiff's original complaint because plaintiff's amended complaint omits those claims, thereby abandoning them and rendering our consideration of them moot.

Plaintiff alleges that he has been a member of IIG-DSS Technologies, LLC ("IIG-DSS") since its formation in 2004, and that he was the vice president of sales and finance for IIG-DSS. Defendant Leroy DeLisle was named in the complaint as the chief executive officer of IIG-DSS and, commencing in 2006, a shareholder of the company. Defendant Ron Allman was the alleged vice president of all operations for IIG-DSS. Defendant Francis Leo was IIG-DSS's president. He also allegedly served as president of an entity, International Industrial Group, Inc. (IIG Inc.), which was a member of IIG-DSS. This action arises out of plaintiff's claim that the various defendants breached fiduciary duties and otherwise caused financial harm to IIG-DSS by failing to seek out new business or new investors and by actively attempting to usurp IIG-DSS's

contracts with defendant Woco U.S.A., Inc., and another company, Hi-Lex. Plaintiff's complaint sought recovery under various tort theories and for breach of contract.

In lieu of an answer, defendants-appellants moved for summary disposition pursuant to a number of court rules. They argued that, pursuant to MCR 2.116(C)(4), the trial court lacked subject-matter jurisdiction because of IIG-DSS's pending bankruptcy proceeding; that pursuant to MCR 2.116(C)(7), plaintiff's claims were barred because plaintiff failed to comply with federal bankruptcy rules; and that pursuant to MCR 2.116(C)(5) and (8) plaintiff lacked standing to assert the claims in his individual capacity and failed to satisfy the criteria for filing suit on behalf of IIG-DSS. The trial court determined that plaintiff should have an opportunity to factually develop his claims to show that he was asserting individual rather than derivative claims and, therefore, denied defendants-appellants' motion.

This Court's grant of leave to appeal was limited to the issues raised in the application; however, we have the authority in extraordinary circumstances to consider issues not raised in the application and supporting brief. See MCR 7.216(A); *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 204; 745 NW2d 125 (2007). Because mootness presents a jurisdictional question that may be raised at any time, we initially consider plaintiff's claim that defendants-appellants' arguments concerning the breach of contract, tortious interference, and conspiracy claims that were alleged in the original complaint are now moot. *Michigan Chiropractic Council v Ins Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 370-374; 716 NW2d 561 (2006) (opinion by Young, J.).

"Mootness precludes the adjudication of a claim where there is no longer an actual controversy." *Id.* at 371 n 15. Mootness will also be found where "an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004); but see *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990) (an issue will not be deemed moot if a trial court's adverse order or judgment may have collateral legal consequences for a defendant). A court does not reach moot issues or declare principles of law that have no practical effect in a case, unless the issue involves a matter of public significance that is likely to recur and evade judicial review. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), clarified in part in *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006).

The record shows that after the trial court denied defendants-appellants' summary disposition motion, plaintiff filed an amended complaint that omitted the previously alleged breach of contract, tortious interference, and conspiracy claims. We agree with plaintiff that these claims are now moot. Plaintiff has abandoned the claims by filing an amended complaint that excludes the claims. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979). Therefore, we limit our review to the breach of fiduciary duty and fraud claims upon which plaintiff seeks an award of monetary damages from defendants DeLisle and Allman.

We review a trial court's summary disposition decision de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Our review is limited to the record before the trial court at the time of its decision. *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). The trial court did

not specify which subrule it relied on in denying the motion for summary disposition, but it appears that the trial court relied solely on the pleadings; we therefore review its decision under MCR 2.116(C)(8). *Spiek, supra* at 338; *Michigan Chiropractic Council, supra* at 374 n 25; *Leite v Dow Chem Co*, 439 Mich 920; 478 NW2d 892 (1992) (issue of standing is properly considered under MCR 2.116(C)(8) or MCR 2.116(C)(10), depending on the pleadings and the circumstances of the case). Under MCR 2.116(C)(8), the pleadings alone are considered and viewed in the light most favorable to the non-moving party; summary disposition is appropriate where a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the plaintiff's recovery. *Maiden, supra* at 119-120.

The pleaded allegations must be sufficient to reasonably inform an adverse party of the nature of the claims the adverse party is called on to defend. MCR 2.111(B)(1); *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006); see also MCR 2.112(B) (circumstances constituting fraud must be stated with particularity). "A mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Kloian, supra* at 241, quoting *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 592; 683 NW2d 233 (2004).

The doctrine of standing generally requires that the party's interest in the outcome of the litigation ensure sincere and vigorous advocacy. *Michigan Chiropractic Council, supra* at 371 n 13. A plaintiff must prove (1) a concrete injury in fact, (2) a causal connection between the injury and conduct complained of that it fairly traceable to the defendant's action, and (3) that the injury will likely be redressed by a favorable decision. *Id.* at 371 n 13. Under MCR 2.201(B), subject to certain provisions, an action must be prosecuted in the name of the real party in interest. *Leite, supra* at 920. "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997).

In cases involving corporations, the "[t]he doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). An exception exists if the shareholder, officer, or employee is owed a duty independent of the corporation. *Id.*; *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). Another exception applicable to shareholders allows for an individual lawsuit if the injury sustained is separate and distinct from other stockholders generally. *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989). Although the instant case involves a limited liability company instead of a corporation, we shall consider corporate principles by analogy, to the extent that the situation supports them. Cf. *Energy Investors Fund, LP v Metric Constructors, Inc*, 351 NC 331; 525 SE2d 441 (2000).

A limited liability company is a form of "hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation but treats the entity and its

members as a partnership for tax purposes." Am Jur 2d, Limited Liability Companies, § 1. It is defined in Michigan's Limited Liability Company Act (LLCA), MCL 450.4101 *et seq.*, as "an entity that is an unincorporated membership organization formed under this act." MCL 450.4101(2)(k).[1] Under the LLCA, members have no interest in specific limited liability company property. MCL 450.4504(2); *VanderWerp v Plainfield Twp,* 278 Mich App 624, 630; 752 NW2d 479 (2008). But they do have a limited statutory right to file an action in circuit court against managers and members. MCL 450.4515.[2] Members may also serve as managers of the limited liability company. MCL 450.4401. A "manager" is a person "designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers." MCL 450.4402(2)(o). Under MCL 450.4404(1), a "manager shall discharge his or her duties as a manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the limited liability company."

Limited liability companies involve fiduciary relationships. See Am Jur 2d, Limited Liability Companies, § 11; cf. *Salm v Feldstein,* 20 AD3d 469, 469-470; 799 NYS2d 104 (2005) (managing member of limited liability company owed fiduciary duty to co-member to disclose all material facts before purchasing the co-member's interest in the company). "When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 43; 698 NW2d 900 (2005). The LLCA's requirement that a manager discharge duties "in the best interests of the limited liability company," MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members. Cf. *Remora Investments, LLC v Orr,* 277 Va 316, 673 SE2d 845 (2009) (Virginia statutory law containing similar "best interests of the limited liability company" provision did not provide a basis for member to bring a claim for breach of fiduciary duty directly against another manager or member).

Critically, plaintiff's original complaint alleged that DeLisle and Allman, in their capacities as officers of IIG-DSS, owed fiduciary duties to plaintiff personally, in his capacity as a member of IIG-DSS. Plaintiff specifically alleged that DeLisle and Allman owed duties of good faith, loyalty, and fair dealing, and that they failed to act in the best interests of plaintiff and IIG-DSS. Applying the standards applicable to corporations by analogy, plaintiff's allegations are legally insufficient to establish plaintiff's standing to pursue an individual claim for breach of fiduciary duty against DeLisle or Allman. Plaintiff failed to allege a specific fiduciary duty owed to him independent of IIG-DSS. *Belle Isle Grill Corp, supra* at 474; *Michigan Nat'l Bank, supra* at 679. Further, plaintiff failed to allege any injury separate and distinct from members generally that would allow an individual lawsuit for the injury sustained. *Christner, supra* at 9.

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[1] The definitional sections that we cite in this opinion are part of the recent amendments in 2008 PA 566, effective January 16, 2009. The amendments do not substantively change the prior definitions.

[2] The scope of this appeal does not involve a claim under MCL 450.4515.

The pleaded injury, viewed most favorably to plaintiff, arises solely from the financial demise of IIG-DSS.

We reach the same conclusion regarding plaintiff's silent fraud claim, because that claim is equally dependent on the existence of a legal duty. *M & D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Plaintiff pleaded a separate claim of fraudulent misrepresentation against Allman, based on Allman's alleged false denial that he and other defendants were performing certain work apart from IIG-DSS. However, plaintiff's complaint does not allege any falsity intended to induce some personal action or inaction by himself personally. Rather, the allegations indicate a fraud directed at IIG-DSS. Because the alleged wrong is not a breach of duty owed personally to plaintiff, but rather results only from injury to IIG-DSS, it is a derivative claim. *Michigan Nat'l Bank supra* at 679-680. Therefore, we reverse the trial court's denial of defendants-appellants' motion for summary disposition pursuant to MCR 2.116(C)(8) with respect to the breach of fiduciary duty and fraud claims alleged in plaintiff's original complaint.

Because plaintiff lacks standing to pursue his fraud and breach of fiduciary duty claims, and has not attempted to assert a claim on behalf of IIG-DSS, it is unnecessary to consider defendants-appellants' other arguments regarding whether plaintiff could maintain an action on behalf of IIG-DSS.

Finally, we are not persuaded that the trial court should have granted summary disposition under MCR 2.116(C)(4) based on a lack of subject-matter jurisdiction. "Subject-matter jurisdiction is a court's authority to try a case of a certain kind or character." *Michigan Chiropractic Council, supra* at 374 n 24. Defendants-appellants' cursory argument that plaintiff's claims belong in federal bankruptcy court are insufficient to demonstrate that the trial court lacked authority to decide whether plaintiff could bring an individual claim for damages. This Court "will not search for law to sustain defendants' position where defendants fail to cite any authority supporting their claim." *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001).

Reversed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood